No. 91-781

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases:	Page
Barry Industries, Inc. v. *Aetna Casualty & Surety Co.*, 302 A.2d 61 (D.C. 1973)	13
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)	12
Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985)	14
Connecticut v. *Doehr*, 111 S. Ct. 2105 (1991)	14
Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163 (1989)	18
Fuentes v. *Shevin*, 407 U.S. 67 (1972)	14
General Credit Corp. v. *Moore*, 260 N.W. 368 (Neb. 1935)	13
General Motors Corp. v. *United States*, 496 U.S. 530 (1990)	10
Goodwin v. *United States*, cert. denied, 112 S. Ct. 1264 (1992)	2
Gozlon-Peretz v. *United States*, 111 S. Ct. 840 (1991)	10
Henderson's Distilled Spirits, 81 U.S. (14 Wall.) 44 (1871)	11
Isbrandtsen Co. v. *Johnson*, 343 U.S. 779 (1952)	11
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110 (1954)	18
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	19
One 1988 Mercedes Benz 560 SL, AFO No. 912483 (Oct. 18, 1991)	17
Real Property at 82-550 Avenue 56, Thermal, California, AFO No. 911415 (Apr. 5, 1991)	17
Russello v. *United States*, 464 U.S. 16 (1983)	10
Schrier v. *Home Indemnity Co.*, 273 A.2d 248 (D.C. 1971)	13
Smith v. *Barrick*, 85 N.E.2d 101 (Ohio 1949)	13
State Farm Mutual Automobile Ins. Co. v. *Wagnon*, 304 So. 2d 216 (Ala. Civ. App. 1974)	12-13
Tumey v. *Ohio*, 273 U.S. 510 (1927)	15, 16
United States v. *Farrell*, 606 F.2d 1341 (D.C. Cir. 1979)	4
United States v. *Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337 (1806)	3

Cases—Continued: Page

United States v. *1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814) 11
United States v. *Stowell*, 133 U.S. 1 (1890) 6, 11
Wade v. *United States*, 112 S. Ct. 1840 (1992) 15
Ward v. *Village of Monroeville*, 409 U.S. 57 (1972) 15, 16
Whidden v. *Johnson*, 54 So. 2d 40 (Fla. 1951) 13

Constitution, statutes and regulations:

U.S. Const.:
Amend. IV 1
Art. 3, § 3:
Cl. 2 2
Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 4
18 U.S.C. 1963(c) 8, 10
21 U.S.C. 853(c) 8, 10
21 U.S.C. 881 8
21 U.S.C. 881(a)(6) ..... *passim*
21 U.S.C. 881(d) 16, 18
21 U.S.C. 881(h) 5, 7-8, 10, 11
28 U.S.C. 524 19
28 U.S.C. 524(c) 16
28 U.S.C. 524(c)(1)-(10) 15
28 U.S.C. 524(c)(1)(D) 16, 18
28 U.S.C. 524(c)(1)(E) 16, 18
21 C.F.R. 1316.79 17
28 C.F.R.:
Section 9.2(k) 14
Section 9.5(b)(1) 17
Section 9.3(b)(2) 14
Section 9.3(c) 14
Section 9.3(d) 14
Section 9.5(b)(1) 17
Section 9.5(b)(2) 17

Miscellaneous:

1991 Annual Report of the Dep't of Justice Asset Forfeiture Program 16
124 Cong. Rec. 34,671 (1978) 4

Miscellaneous—Continued: Page

38 C.J.S. *Gifts* (1952) 13
73 C.J.S. *Property* (1983) 12
77 C.J.S. *Sales* (1943) 12
S. 2758, 102d Cong., 2d Sess. (1992) 19
S. Rep. No. 225, 98th Cong., 2d Sess. (1984) 8
D. Smith, *Prosecution and Defense of Forfeiture Cases* (1991):
Vol. 1 2
Vol. 2 15
U.S. Dep't of Justice, *Expedited Forfeiture Settlement Policy for Mortgage Holders* (Apr. 1992) .. 17

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1. a. Respondent Goodwin devotes scant attention to the issue of statutory construction on which the Court granted certiorari in this case: whether the recipient of a gift purchased with drug proceeds can assert an "innocent owner" defense to forfeiture under 21 U.S.C. 881 (a)(6). Rather, she devotes a good part of her brief to arguing that (1) due process and the Fourth Amendment require that an innocent owner have an evidentiary hearing before seizure of a residence (Resp. Br. 21-26); (2) the district court erred in finding probable cause to believe that the property was purchased with the proceeds of a drug transaction (*id.* at 12-13 n.3, 24-25); and (3) the government improperly relied on respondent's immunized testimony in establishing probable cause (*id.* at 3-4 nn.1-2). All of these contentions were presented to this Court in respondent's cross-petition for a writ of cer-

tiorari in this case, which this Court denied. *Goodwin* v. *United States*, cert. denied, 112 S. Ct. 1264 (1992). These questions are not properly before the Court.[1]

b. Respondent also maintains (Br. 6-12)—for the first time in this litigation—that her residence does not qualify as drug "proceeds" within the meaning of Section 881(a)(6).[2] Respondent claims that the term "proceeds" should include only "proceeds in the hands of the criminal defendant" and not "items that are transferred from * * * a drug dealer to others." Br. 11. She suggests that if a third party obtains proceeds from a drug dealer and uses that money to buy property, the property is not itself proceeds subject to forfeiture under the statute. The district court implicitly rejected this position, Pet. App. 21a-25a, and respondent did not challenge that finding in the court of appeals or before this Court in her brief in opposition to certiorari or in her cross-petition for a writ of certiorari. The question is therefore not properly presented.

In any event, respondent's contention is plainly wrong. Section 881(a)(6) separately provides for the forfeiture of anything of value "furnished or intended to be furnished * * * in exchange for a controlled substance" *and* "all proceeds traceable to such an exchange." See 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 4.03[4][a], at 4-66 (1991) (noting that Section 881(a)(6) distinguishes between "the cash directly acquired in exchange for the drugs" and items obtained or purchased with that money). The former category covers the funds that Joseph Brenna obtained in exchange for

[1] Respondent's argument based on U.S. Const. Art. 3, § 3, Cl. 2 (Resp. Br. 19-21) is a bit far afield; this case does not involve punishment for treason.

[2] In an apparent typographical error, respondent's brief states that Goodwin "severed her relationship with Brenna in late 1982 and barred him from the property. J.A. 32." Br. 2. The cited page of the joint appendix confirms that the alleged parting of the ways did not occur until late 1987, five years after the house was purchased.

drugs and subsequently gave to respondent Goodwin. Those funds did not lose their character as money "furnished * * * in exchange for a controlled substance" by being transferred to respondent Goodwin, who received the money as a gift from Brenna. Indeed, respondent appears to acknowledge that "the thing itself"—that is, the item tainted by the original transaction—is forfeitable regardless of the hands in which it is found. See Resp. Br. 8 (quoting *United States* v. *Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 354 (1806)).

The residence that respondent Goodwin purchased with the drug money received from Brenna is also subject to forfeiture as "proceeds traceable to [a drug] exchange." That separate and alternative forfeiture provision would be superfluous if Congress had meant to provide for forfeiture only of the direct profits of a drug transaction, but not for items obtained or purchased with money derived from drug transactions. Moreover, if items purchased with drug profits were not forfeitable, a drug dealer could easily shelter drug profits from forfeiture—and wholly defeat Congress's intent—simply by exchanging them for other assets.[3]

[3] Contrary to respondent's implication (Br. 7-8), this Court's decision in *United States* v. *Grundy & Thornburgh*, *supra*, provides no support for the proposition that there can never be a valid forfeiture of an "article for which [drug profits are] exchanged," but only of the profits directly derived from a drug sale. The statute at issue in that case did not provide for the forfeiture of "proceeds" of an illegal activity; rather, it authorized the forfeiture of a "vessel * * * or of the value thereof, to be recovered * * * of the person" making a false registration of the vessel. See 7 U.S. (3 Cranch) at 350. The Court construed the statute to require the United States to elect between forfeiture of the falsely registered vessel or of money received from the sale of the vessel. In dictum, the Court suggested that the statute would not permit the forfeiture of "any article for which the thing may be exchanged" by the owner making the false registration if that exchange took place before enforcement of the forfeiture. 7 U.S. (3 Cranch) at 354. In contrast, Section 881(a)(6), by its express terms, covers forfeiture of items exchanged for the controlled substance, as well as proceeds traceable to such

Furthermore, nothing in the statute suggests that "proceeds" are limited to derivative items in the hands of drug dealers, and lose their character as proceeds when found in the hands of third parties. Certainly, there is no basis in the statute for distinguishing between items purchased with drug profits by the drug dealer himself or by a third party who has received the drug profits as a gift. See Joint Explanatory Statement accompanying the Psychotropic Substances Act of 1978 (Pub. L. No. 95-633, 92 Stat. 3768), 124 Cong. Rec. 34,671 (1978) (cited at Gov't Br. 4 n.1) (Section 881(a)(6) authorizes the forfeiture of drug profits that are "commingled with other assets, involved in intervening legitimate transactions, or otherwise changed in form"). Thus, when respondent Goodwin purchased her residence with drug money provided as a gift by Brenna, the residence became "proceeds traceable to [a drug] exchange" and was forfeitable under Section 881(a)(6).[4]

2. a. Turning to the question that *is* properly presented in this case, the crux of the government's position is that a person acquiring property after the forfeitable of-

an exchange. *United States* v. *Farrell*, 606 F.2d 1341 (D.C. Cir. 1979), see Resp. Br. 8-9, 10, is readily distinguishable on the same basis.

[4] Respondent maintains (Resp. Br. 9-11) that it is necessary to permit individuals acquiring tainted proceeds to assert innocent ownership under Section 881(a)(6) because that provision authorizes the forfeiture of property involved in the entire chain of transactions resulting from the initial exchange of drug profits. The scenarios posited by respondent, however, are more theoretical than real, since the government does not ordinarily seek forfeiture of tainted assets in the hands of innocent third parties resulting from an exchange that generates "derivative proceeds" that can be seized from drug dealers. See Gov't Br. 36 n.13. In this case, however, the transaction generated no forfeitable assets in the hands of the drug dealer: here, Brenna made a direct gift of drug profits to respondent Goodwin, which she used to purchase the house that she then shared with Brenna. The direct benefit Brenna derived from his gift illustrates how readily drug dealers could circumvent the forfeiture provisions if respondent's interpretation were adopted.

fense cannot assert a statutory innocent ownership defense, because Section 881(h)—the relation-back provision—prevents that person from becoming an "owner," innocent or otherwise. Two amici attempt to discredit the government's reading of the statute by focusing on "exactly what property is subject to [21 U.S.C. 881(h)]." Br. of Dade County Tax Collector, et al. (Dade County Br.) 11; Br. of American Land Title Ass'n, et al. (ALTA Br.) 11. However, in asserting that "the relation-back provision of section 881(h) does not apply to an innocent owner's property" (ALTA Br. 11; Dade County Br. 12), the amici simply restate the Third Circuit's theory of the statute, which is that "property described in subsection (a)"—that is, property to which Section 881(h) applies to vest title in the United States upon commission of the forfeitable offense—does not include property that subsection (a) excepts from forfeiture in the innocent owner proviso.

This theory fails because Section 881(h) applies by its express terms to "property described in subsection (a)," and property subject to the innocent owner provision of Section 881(a)(6) is necessarily "property described in subsection (a)." The innocent owner proviso specifies that a certain subcategory of "property described in subsection (a)" shall not be subject to forfeiture, but the proviso certainly does not state that the subcategory of property is somehow not "property described in subsection (a)"—it plainly is, or else there would be no reason to except it from forfeiture in the first place. Applying both Section 881(h) and the innocent owner proviso to the property described in subsection (a)(6) means that property that belonged to someone other than the drug dealer at the time it was used for illegal purposes can be reclaimed by its (former) owner and ultimately exempted from forfeiture if that owner can demonstrate innocence.

Respondent argues (Br. 38) that permitting a person who acquires property *after* the offense (and after the relation-back Section operates to vest title in the United

States) to reclaim the property as an innocent owner does no more violence to the statute than "the scenario where the government, having been vested with title by virtue of 881(h)," loses its title based on an assertion of innocence by a person who "held title prior to the criminal transaction." This line of reasoning ignores the fundamental difference between persons acquiring title before and after the events giving rise to forfeiture. A person whose interest in property predates the forfeitable offense was an "owner" of that property, within the meaning of the statute, before it ever became subject to forfeiture. Because that person has a valid ownership interest up to the moment that the property becomes subject to forfeiture, he can invoke the exemption from relation-back, and reclaim his property, at the very point at which relation-back would otherwise be brought to bear to deprive him of his property interest.[5]

In contrast, a person who acquires property *after* the forfeitable offense occurs cannot invoke the innocent

[5] Relying on *United States* v. *Stowell*, 133 U.S. 1 (1890), amicus ALTA (Br. 14) suggests that an innocent owner defense limited to persons with a prior interest in property is superfluous because "the common law relation back doctrine did not defeat the rights of a claimant who acquired his interest in the property prior to the time of the illegal activity giving rise to the forfeiture." This assertion is patently wrong, and rests on a fundamental misreading of *Stowell*. The Court in that case affirmed that the common law relation-back doctrine applies with full force regardless of the identity of the property-holder and his method of acquisition, but found that the specific statutes at issue—which concerned the forfeiture of unlawful distilleries and the premises upon which they operated—excepted from forfeiture "the interest of an innocent mortgagee or other person having a lien on the lot or tract of land on which the distillery is situated." 133 U.S. at 15; see also *id.* at 12 (emphasis added) (statute providing for forfeiture of "all the right, title and interest * * * of every person who *knowingly* has suffered or permitted the business of a distiller to be there carried on"). See American Bankers Ass'n (ABA) Br. 12 (emphasis added) (noting that the Court in *Stowell* recognized "*statutory* protection for innocent owners"); Amicus Federal Home Loan Mortgage Corp. (FHLMC) Br. 17 (discussing innocent owner defense in *Stowell* as matter of statutory construction).

owner proviso to block the effect of the relation-back doctrine at the very point in time that it operates, because that person does not even acquire the interest in property that would be the basis for invoking the exception until after Section 881(h) vests title to the property in the United States. In effect, that person does not even enter the picture until after title has passed from the original owner to the United States at the time the offense is committed. Thus, a person acquiring the property *after* the events giving rise to forfeiture cannot even become an "owner"—or qualify as an innocent owner—unless title fails to vest in the United States before the acquisition occurs, so that the person can take good title from the drug dealer. This would require that operation of relation-back be suspended for some period after the events giving rise to forfeiture, until such time as the third party acquires the property. The statute, however, expressly provides that "[a]ll right, title, and interest" in the subject property vests in the United States at a specific point in time: "upon commission of the act giving rise to forfeiture." 21 U.S.C. 881(h). Thus, the third-party transfer—and the corresponding exemption from the relation-back doctrine—come too late. By the time the property is conveyed to another party, title has already passed from the drug dealer to the United States, and cannot validly be acquired by any other person.[6]

[6] Respondent and amici rely on legislative history consisting almost entirely of floor remarks by sponsors of the amendment that became Section 881(a)(6). See Resp. Br. 30; Dade County Br. 16; ALTA Br. 11-12; FHLMC Br. 13. As we have recognized, Gov't Br. 35 n.12, some of the legislators' remarks during the floor debates reflect a belief that the statute exempts from forfeiture the property of some individuals acquiring drug proceeds after the acts giving rise to forfeiture. That view, however, cannot be squared with the language and structure of the statute that was actually enacted. Such floor remarks cannot be permitted to stretch the term "owner" to cover a category of individuals who are not, and never have been, owners under the well-established relation-back principle, which applies with full force to forfeitures under Section 881(a)(6).

Amici Dade County (Br. 24-25) and FHLMC (Br. 14-15) also rely on the Senate Report accompanying the bill that added Section

b. Respondent and amici do not even attempt to explain how the statutory test for innocence, which looks to the claimant's awareness of the illegal acts giving rise to forfeiture at the time they occur, fits in with their position that persons acquiring property *post delicto* may assert the innocent ownership defense. They fail to come to grips with the government's observation that, because the statute permits anyone who was unaware of the offense at the time it occurred to show "innocence" under the statute, persons acquiring property after the offense was committed could keep their property even if they were fully aware of its illegal source at the time of the transfer. See Gov't Br. 23-27. In the only brief even to address this aspect of the statute, Amicus Federal Home Loan Mortgage Corp. (FHLMC), Br. 11, insists that the person's "innocence" should be assessed as of "the time the property is acquired," but makes no effort to explain how the language of the statute can plausibly be construed to achieve this result.

c. Amici place great emphasis on the argument that the innocent owner exception must apply to property acquired after the offense giving rise to forfeiture, because

881(h) to the civil forfeiture statute in 1984. See Gov't Br. 19-20 & n.4. However, the remarks quoted in the Dade County Br. 24 (see S. Rep. No. 225, 98th Cong., 2d Sess. 200-201 (1984)), do not refer to the amendment that became Section 881(h); rather they pertain to the amendment codified at 18 U.S.C. 1963(c)—the criminal forfeiture section of RICO—which differs in important respects from Section 881 (see Gov't Br. 31 n.10) by providing forgiveness for certain post-offense transferees. Likewise, Amicus FHLMC (Br. 14-15) reprints a portion of a law review article that erroneously states that remarks in the Senate Report concerning Section 1963(c) were incorporated by reference into the portions of the Report commenting on Section 881(h). However, the portion of the Senate Report that the law review article describes as incorporating by reference the commentary on Section 1963(c), see S. Rep. No. 225, *supra*, at 211-212, has nothing to do with Section 881(h), but rather concerns the amendment to 21 U.S.C. 853(c), the *criminal* forfeiture statute, which contains the same language as Section 1963(c). Section 881(h) is discussed in other parts of the 1984 Senate Report, see S. Rep. No. 225, *supra*, at 196, 215.

it is impossible to acquire "drug proceeds" until after the transaction takes place. See ABA Br. 14-15; FHLMC Br. 9. As we pointed out in our opening brief (Br. 27 n.8), that argument rests on the fallacious assumption that the assets in question must have acquired their character as "drug proceeds" before they were transferred to the party asserting innocent ownership, rather than at some later point. Nothing in the statute mandates that assumption. Thus, while it is "obvious * * * that one cannot 'own' the proceeds of an illegal act prior to the commission of the illegal act," ABA Br. 14, it is also irrelevant, since the statute clearly allows for the assertion of an innocent owner defense with respect to previously untainted property that is later transformed into property subject to forfeiture.[7] If that transformation

[7] Amicus ALTA, see Br. 12-13 & n.6, objects that, if the government's view in this case prevails, the Section 881(a)(6) innocent owner exception will not even apply to the majority of proceeds in the hands of third parties at the time the government attempts to forfeit the property. This claim, however, greatly exaggerates the scope of the issue presented in this case. A holding in the government's favor here would directly affect only proceeds that third parties receive as gifts; this case does not present the question whether assets acquired in other ways would be exempt from coverage of the innocent owner proviso. See Gov't Br. 36 n.13.

However, even if the majority of proceeds in the hands of third parties would not fall within the innocent owner exception, that would not constitute a persuasive reason to ignore the statute's plain language by expanding on the scope of the proviso. Contrary to respondent's and amici's suggestion (see Resp. Br. 32; ABA Br. 8-9; ALTA Br. 13; FHLMC Br. 10), there are sound reasons to accord different statutory treatment to property acquired before, as opposed to after, the offense giving rise to forfeiture. As acknowledged in the brief of amicus ABA, at 7 & n.7, the purpose of drug forfeiture laws is to "take the profit out of drug trafficking" and to ensure that "crime does not pay." Those goals will be undermined if drug dealers can curry favor or enjoy the use of their ill-gotten gains by distributing their wealth to family members, companions, or friends, innocent or otherwise. See Gov't Br. 42. Beyond that, however, a law providing for the forfeiture of "tainted" assets, wherever found, can also be expected to attenuate the finan-

occurs unbeknownst to the owner, the owner may assert the innocent owner defense to forfeiture.

d. Respondent and amici also question the basis for the disparity in the scope of the exception for innocent third parties in some criminal statutes and in the civil forfeiture provision. See Resp. Br. 32-35; Dade County Br. 17-21; ABA Br. 7; FHLMC Br. 15. As discussed in our opening brief, at 31 & n.10, 32-34 n.11, the relation-back provision that was incorporated into certain criminal forfeiture statutes in 1984 contained an explicit exemption for the property of innocent bona fide purchasers of tainted assets. See 21 U.S.C. 853(c); see also 18 U.S.C. 1963(c). The relation-back provision that was simultaneously added to the civil statute, 21 U.S.C. 881 (h), does *not* contain this language. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 847 (1991); *General Motors Corp.* v. *United States*, 496 U.S. 530, 541-542 (1990).

As already discussed, see Gov't Br. 33 n.11, Congress's failure to create identical exceptions under the criminal and civil statutes is best explained by reference to the historical differences between *in personam* and *in rem* forfeitures, which might well account for Congress's greater attention to third-party interests in the criminal context. What amici conveniently overlook is that, under respondent's view of Section 881(a)(6), recipients of gifts of drug proceeds such as respondent—who are not eligible to invoke an innocence exception under the criminal statute—would be able to do so under the civil statute. There is no apparent reason why Congress would choose

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cial advantages of drug dealing by making relatives, merchants, and others wary of doing business with persons who profit from the drug trade.

to protect donees in one statute but not in the other, and neither respondent nor amici provide one.

3. Respondent fails even to address the common law background of the relation-back doctrine.[8] As explained in our opening brief, that "settled doctrine" establishes that title to forfeit property vests in the United States at the time of the act giving rise to forfeiture, and that "it is not in the power of the offender * * * to defeat the forfeiture by any subsequent transfer of the property." *United States* v. *Stowell*, 133 U.S. at 16-17; *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 57-58 (1871). Congress codified this doctrine in plain terms in Section 881(h). Because "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952), and because this Court has specifically confirmed the presumption that the relation-back doctrine applies to forfeiture statutes unless the statutory language "show[s] a different intent," *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 57, the "innocent owner" proviso should be construed—consistent with the relation-back doctrine—as limited to those with an ownership interest antedating the events giving rise to forfeiture.

4. a. Respondent and amici contend that this Court must reject the government's construction of Section 881(a)(6), because it "raise[s] serious constitutional problems" by depriving some holders of after-acquired property of their constitutional rights to due process of law. Resp. Br. 27; ALTA Br. 22; Dade County Br. 26-27. Adopting the government's construction of the statute, however, will not result in the violation of the substantive due process rights of any person who ac-

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[8] Respondent's only response to the government's reliance on *United States* v. *1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814), see Gov't Br. 16-17, is to quote from the dissent in that case. Resp. Br. 16-17.

quires property *after* it becomes subject to forfeiture, even if that person is "exceptionally innocent" as described in this Court's dictum in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-690 (1974). First, all persons in that category are eligible to request equitable remission or mitigation of forfeiture. See Gov't Br. 40 n.16. Thus, it is entirely possible that no person who would be eligible to assert a *Calero-Toledo*-based claim of unconstitutional deprivation would ever have occasion to do so, for the simple reason that no person in that category may ever be denied remission.[9]

In any event, as we noted in our opening brief, at 40 n.16, the Court's discussion in *Calero-Toledo* concerned "owners" as the government construes that term in Section 881(a)(6)—that is, persons acquiring property *before* the events triggering forfeiture. We seriously doubt that a person receiving "tainted" property from a drug dealer after title to that property has passed to the United States by operation of law could assert a constitutional claim to that property. The common law has long recognized that there are instances in which a person cannot take good title from one who does not possess it. For example, no person, however unaware of the source of the property, can acquire good title to stolen goods as against the original owner.[10] In addition, the recipient

[9] Respondent also claims (Br. 15-16) that she, in particular, will be deprived of her constitutional right to due process of law under the Court's dictum in *Calero-Toledo* if Section 881(a)(6) is not construed to permit her the opportunity to establish her innocence, and regain her property, in the judicial forfeiture proceeding. This argument was not presented to, or addressed by, the courts below, see Resp. C.A. Br. 14-38; Pet. App. 1a-35a, and thus is not properly before this Court. In any event, that claim is unripe because the adjudication of forfeiture of her property has not been finalized and because the merits of her argument depend on resolution of her claim of innocence, which would require judicial fact-finding concerning her degree of awareness of the crimes underlying the forfeiture.

[10] 77 C.J.S. *Sales* § 295 (1943); 73 C.J.S. *Property* § 34 (1983); see, *e.g.*, *State Farm Mutual Automobile Ins. Co.* v. *Wagnon*, 304 So. 2d 216, 220 (Ala. Civ. App. 1974) ("[a] person who has stolen goods of another cannot pass title thereto to another, whether such other knew, or did not know, that the goods were stolen"); *Barry Industries, Inc.* v. *Aetna Casualty & Surety Co.*, 302 A.2d 61, 63 (D.C. 1973); *Schrier* v. *Home Indemnity Co.*, 273 A.2d 248, 250 (D.C. 1971).

of a gift cannot take good title if the donor did not own the property.[11] These established rules of property law have never been thought to create constitutional difficulties; in the same vein, the refusal to recognize an ownership interest in property acquired from a drug dealer—to whom, by operation of a valid statute, it does not belong—cannot possibly violate the Constitution.

b. Because no person who acquires property that has previously become subject to forfeiture by reason of a past offense has a constitutional right to retain that property, there is no merit to amici's assertion that the procedures for obtaining remission and mitigation of forfeiture are inadequate to protect those persons' constitutional rights. Although a person in possession of property may well be entitled to a finding of probable cause that the property represents the proceeds of a drug transaction, that finding, once made, establishes a defect in title that deprives the individual of any further claim to the property. The person holding the property has no further constitutional right to prove his innocence in court, or in any other proceeding.

But even assuming that an "exceptionally innocent" person who has acquired tainted property could claim a *Calero-Toledo*-based right to avoid forfeiture of the property, the procedures available to that person for seeking the return of the property would still be constitutionally adequate. That person may file a petition for remission and mitigation of forfeiture. The regulations governing disposition of claims for remission require the pertinent agency to conduct an investigation of the merits of the

[11] See 38 C.J.S. *Gifts* § 32 (1952); *Whidden* v. *Johnson*, 54 So. 2d 40 (Fla. 1951); *Smith* v. *Barrick*, 85 N.E.2d 101 (Ohio 1949); *General Credit Corp.* v. *Moore*, 260 N.W. 368, 369 (Neb. 1935).

petitioner's claims. The Attorney General must consider the results of that investigation as well as any materials submitted by the petitioner before making a decision. 28 C.F.R. 9.3(b)(2), (c) and (d). There is no limit on the information or evidence that may be submitted in support of a petition for remission. If the petition is denied, a petitioner may request reconsideration based on new evidence. 28 C.F.R. 9.2(k). Although the regulations do not provide for an evidentiary hearing, see 28 C.F.R. 9.3(d), there is no reason to believe that the "risk of error" with regard to matters bearing on remission is so great without a face-to-face hearing that such a hearing is constitutionally required. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 344-345 (1976); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545-546 (1985).[12]

c. Amici also object to the administrative procedures for equitable remission and mitigation of forfeiture on the ground that the Attorney General's decision whether to return forfeitable property is largely discretionary and unreviewable (Resp. Br. 28; ALTA Br. 17-20), the test

[12] Respondent's and amici's procedural due process objections appear to be directed in part at the relationship between the timing of the "deprivation" of property subject to forfeiture and the point at which the property-holder receives a "hearing" on the issue of innocence. For example, respondent finds fault with the procedures afforded persons in her position prior to seizure of their property. See Resp. Br. 21-23. Although an initial seizure by the government does effect a significant "deprivation" of property, the procedural defect of which respondent complains—that the opportunity to prove innocence through a petition for equitable remission and mitigation, in effect, comes too late—would not be cured by interpreting Section 881(a)(6) to permit persons holding after-acquired property to assert innocence in court, since the judicial forfeiture proceeding will necessarily take place *after* the property is seized. For this reason, the Court's decisions in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991) (see Resp. Br. 20-25; ALTA Br. 24), which concern the adequacy of procedures provided prior to the seizure of property, are inapposite to the issue before this Court—which concerns the setting in which innocent owner defense can be asserted *after* property is seized.

for proving "innocence" under the remission regulations is more exacting than the standard applied in some jurisdictions under the statute (see ALTA Br. 20; ABA Br. 11), the Attorney General is not a sufficiently impartial decision-maker (Resp. Br. 27; ALTA Br. 23), and no attorney's fees are available. None of these objections have force, nor would they justify this Court's misreading the scope of the statutory innocent owner defense.

The fact that the Attorney General's remission decision is discretionary and, in most cases, effectively unreviewable, gives rise to no constitutional concerns so long as the outcome of the decisionmaking process is consistent with constitutional requirements. For the same reason, it is of no consequence that the eligibility standards for equitable remission are somewhat more demanding than the statutory test for innocent ownership in some jurisdictions, since the remission regulations incorporate a standard that meets the requirements of the Constitution as suggested in the *Calero-Toledo* dictum. See Gov't Br. 40 n.16. Further, although the broad grant of discretion to the Attorney General would make judicial review effectively unavailable in most cases, the courts would presumably have the power to entertain colorable claims that the denial of remission or mitigation in a particular case was for an unconstitutional reason. See *Wade* v. *United States*, 112 S. Ct. 1840, 1843-1844 (1992); 2 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 15.04, at 15-26 (1991).

Finally, although the decision whether to grant remission or mitigation of forfeitable property will affect the size of the Assets Forfeiture Fund, see 28 U.S.C. 524(c)(1)-(10), that does not give rise to an unconstitutional conflict of interest under this Court's decisions in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), or *Ward* v. *Village of Monroeville*, 409 U.S. 57, 59 (1972). The compensation received by government officials involved in processing remission petitions is not dependent on the outcome of their decisions nor on the size of the Assets Forfeiture

Fund, cf. *Tumey*, 273 U.S. at 520, 523. The Assets Forfeiture Fund may be used only for specified purposes, see 28 U.S.C. 524(c), and constitutes an insubstantial portion of the amounts generally available to the Attorney General for Department of Justice activities. The Attorney General is not charged with raising revenue or with ensuring a source of financial support for his own department. Cf. *Ward*, 409 U.S. at 59. Finally, the complaint that attorney's fees are unavailable under the remission regulations rings hollow, since "exercise of administrative authority affords innocent claimants a means of recovering property without incurring the expense of attorneys' fees." *1991 Annual Report of the Dep't of Justice Asset Forfeiture Program* at 9 [hereinafter *1991 Asset Forfeiture Report*].

5. Respondent (Br. 27) and her amici (see Dade County Br. 3-4, ALTA Br. 19 n.11) suggest that the opportunity to obtain remission or mitigation of forfeiture or repayment of liens on forfeit property is not available to persons who acquire their interest in property after the offense giving rise to forfeiture. That statement does not accord with the pertinent statutes or regulations governing equitable remission, nor it is consistent with Department of Justice practice. The statutory provisions that authorize the Attorney General to grant remission and mitigation of forfeiture (see 21 U.S.C. 881(d); 28 U.S.C. 524(c)(1)(D) and (E)), are not limited to persons owning property before the events giving rise to forfeiture, see Gov't Br. 38, and the Attorney General routinely grants remission, under the pertinent regulations, to persons who would not qualify as statutory "owners." [13] The regulations permit the return of property to a petitioner with a good faith interest "as owner or *otherwise*," 28 C.F.R. 9.5(b)(1) (emphasis added), see Gov't Br. 38 (quoting 21 C.F.R. 1316.79), and contemplate the availability of remission and mitigation for property acquired after the forfeitable offense by requiring that the petitioner establish a lack of knowledge that the property "*was* or would be involved in any violation of the law," 28 C.F.R. 9.5(b)(2) (emphasis added).[14]

[13] The *1991 Asset Forfeiture Report*, *supra*, at 8-9, states a remission policy that is consistent with the practice of entertaining requests for remission regardless of when a property interest was acquired:

> Even after forfeiture of the property, federal law authorizes the Attorney General to "remit" or mitigate the forfeiture if it would be unduly harsh. The Department of Justice routinely grants petitions for remission or mitigation of forfeiture, primarily to innocent lienholder and innocent family members. It is the Department's policy to liberally grant such petitions as a means of avoiding harsh results.

Innocent lienholders on property that was purchased with drug proceeds regularly are granted remission or mitigation of forfeiture to the extent of their interest, see, *e.g.*, *Real Property at 82-550 Avenue 56, Thermal, California*, AFO No. 911415 (Apr. 5, 1991), as are bona fide purchasers of property forfeit to the United States because of the conduct of the prior owner, see, *e.g.*, *One 1988 Mercedes Benz 560 SL*, AFO No. 912483 (Oct. 18, 1991).

[14] Amicus ALTA, see Br. 19 n.11, points to the statement in the U.S. Dep't of Justice, *Expedited Forfeiture Settlement Policy for Mortgage Holders* at 8 (Apr. 1992), that a financial institution seeking expedited settlement must establish that "it [is] an innocent owner" under the applicable statute and case law. However, the phrase "innocent owner" as employed in this policy statement has not been construed as imposing a requirement that the petitioner be an owner in the statutory sense of having acquired the interest in property before the forfeitable offense, since a lienholder or mortgagee would ordinarily not hold title and thus not be an "owner" in any event. Rather, that requirement has been interpreted as incorporating by reference statutory and judicial standards for demonstrating innocence as a prerequisite for eligibility for expedited settlement of a lienholder's interests.

Amicus Dade County reprints an Office of Legal Counsel memorandum explaining that property forfeit to the United States is immune from state and local taxation under current law. The memorandum cites 28 C.F.R. 9.5(b)(1) for the proposition that the Attorney General lacks authority to grant remission of tax liens arising after the offense giving rise to the forfeiture of property to the United States. See Dade County Br. A7. As applied to prop-

6. Respondent (Br. 39-40) and Amicus ALTA (Br. 5-6) complain that, if the Court accepts the logic of the government's position, no one who acquires a financial interest in tainted assets after the acts giving rise to forfeiture—including bona fide purchasers for value—will be entitled to assert an innocent owner defense under the statute. Even if correct, however, that observation is of little consequence for bona fide purchasers, since the government does not ordinarily seize "tainted" assets from persons acquiring them through the ordinary course of business, see Gov't Br. 36 n.13. Moreover, in the case of third-party interests in property seized directly from those suspected of drug activities—such as mortgages, liens, and joint ownership interests—the government will ordinarily honor a request for equitable remission if the property interest was innocently acquired. See note 13, *supra*. To the extent that individuals or institutions are dissatisfied with the relief currently available under the forfeiture statutes and through equitable remission, however, their recourse lies not with this Court—which must apply the language of the statute as written—but with Congress.[15]

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erty interests generally, however, that regulation has not been construed to bar mitigation or remission of property acquired after the forfeitable offense, and the statute under which the regulation was promulgated certainly does not impose such a restriction. The Attorney General's lack of authority to pay state and local taxes on property forfeit to the United States has nothing to do with the scope of his authority to grant remission; rather, it is grounded in the absence of an "express congressional authorization" to waive tax immunity in the statutory provisions governing remission and mitigation and payment of liens on forfeit property. See 21 U.S.C. 881(d); 28 U.S.C. 524(c)(1)(D) and (E). See also Dade County Br. A5 (citing *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954)).

[15] Indeed, in response to the plight of state and local governments, cf. Dade County Br. 1-6, the Senate Judiciary Committee is currently considering an amendment to 28 U.S.C. 524, see S. 2758, 102 Cong., 2d Sess. (1992), that would authorize the "payment of State and local property taxes on forfeited real property that accrued between the date of the violation giving rise to the forfeiture and the date of the forfeiture order."

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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